UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL MARCHAND, Plaintiff, v. TOWN OF HAMILTON, et al., Defendants.	)	Civil Action No. 09-10433-LTS

ORDER AND MEMORANDUM ON MOTIONS TO DISMISS
OF DEFENDANTS BOWLER AND BREWER.

October 5, 2009

SOROKIN, M.J.

Currently pending are the Motions to Dismiss of Defendant William Bowler (Docket #29) and Defendant Donna Brewer (Docket #20).[1] For the following reasons, Defendant Bowler's motion is ALLOWED and Defendant Brewer's motion is ALLOWED IN PART and DENIED IN PART.

Factual and Procedural Background

The Plaintiff, Michael Marchand, brings suit against the Town of Hamilton, eleven town employees and the Hamilton Police Benevolent Association.[2] Docket #1. In summary form,

[1] Defendant Brewer was previously identified on the Docket as Donna McKenna.

[2] In keeping with the standard applicable to motions brought pursuant to Fed. R. Civ. P. 12, the Plaintiff's allegations are recited as if true. Further allegations are recited as necessary in the course of discussing the merits of each motion, infra.

taking the facts in the light most favorable to Marchand, he alleges that he served as a successful police officer for the Town of Hamilton. Other officers, seeking to discredit the police chief with whom Marchand was closely tied, advanced fabricated or false allegations that Marchand committed misconduct and was unstable, resulting in investigations of Marchand. Although neither the police department nor the Board of Selectman (nor any other person or entity) disciplined Marchand, he contends that as a result of the investigations of him, his reputation was defamed, and that he suffered significant psychological distress and a loss of employment benefits or pay. Presently he is, at his own request, on "injured on duty" status. In addition, he claims that his license to carry was suspended both as part of the foregoing investigations and in response to his airing of certain misconduct committed by others in the department. In this suit, Marchand advances numerous state and federal claims against the Town and various Town officials or employees. Two defendants have moved to dismiss. The remainder of the claims are in discovery.

Discussion

Motion to Dismiss Standard

To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, — U.S. —, 129 S.Ct. 1937, 1949 (2009)(quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). The court "must accept all well-pleaded facts alleged in the Complaint as true and draw all reasonable inferences in favor of the plaintiff." Watterson v. Page, 987 F.2d 1, 3 (1st Cir.1993). This "highly deferential" standard of review "does not mean, however, that a court must (or should) accept every allegation made by the complainant, no matter how conclusory or

generalized." United States v. AVX Corp., 962 F.2d 108, 115 (1st Cir.1992). Dismissal for failure to state a claim is appropriate when the pleadings fail to set forth "factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory." Berner v. Delahanty, 129 F.3d 20, 25 (1st Cir.1997)(quoting Gooley v. Mobil Oil Corp., 851 F.2d 513, 515 (1st Cir.1988) (internal quotation marks omitted). The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Iqbal, 129 S.Ct. at 1949. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Id. The Court's assessment of the pleadings is "context-specific," requiring "the reviewing court to draw on its judicial experience and common sense." Maldonado v. Fontanes, 568 F.3d 263, 269 (1st Cir.2009)(quoting Iqbal, 129 S.Ct. at 1949). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief." Id.

Motion of Defendant Bowler

Marchand directed two claims against Defendant Bowler (a member of the Hamilton Board of Selectmen) in his Complaint: (1) Count XIII, pursuant to 42 U.S.C. § 1985, for civil rights conspiracy; and, (2) Count XIV, for common law civil conspiracy.[3] At the September 11, 2009, hearing on the pending motions, Marchand's counsel indicated that Marchand wishes to

[3] Bowler is sued in both his official and individual capacities. Suing Bowler in his official capacity is the functional equivalent of suing the Town of Hamilton (which Marchand has also done) and a judgment for damages in an official capacity suit would impose liability upon the Town itself. See McMillian v, Monroe County, Ala., 520 U.S. 781, 185, n. 2 (1997). Marchand makes no claim in his Complaint for injunctive relief (a circumstance which would have warranted suit against an individual defendant in his official capacity). Accordingly, any claims against Bowler in his official capacity is merely duplicative of the claims against the Town itself.

voluntarily dismiss Count XIII as to all defendants, and thus only the common law civil conspiracy claim remains against Bowler.

Massachusetts law (which governs Count XIV) recognizes two varieties of common law civil conspiracy: those involving "coercion" – that is, where "the wrong was in the particular combination of the defendants rather than in the tortious nature of the underlying conduct"; and, those of the "concerted action" variety, where liability is imposed on one individual for the tort of another. See Kurker v. Hill, 44 Mass.App.Ct. 184, 188-189 (1998).

Neither the Complaint nor Marchand's opposition to Bowler's motion makes clear which species of conspiracy is alleged, but the Court concludes that he intends the latter type. Count XIV is based upon the allegation that four Hamilton police officers (Defendants Dupray, Wallace, Hatfield and Shaw) acted in concert, via concocted allegations against Marchand of wrongdoing, to deprive him of a constitutional right (namely, Marchand's property interest in his particular duties as Police Prosecutor). Docket # 1 at ¶ 158. Defendant Wallace approached Defendant Brewer (Town Counsel) with false and misleading information concerning Marchand. Id. at ¶ 159. Brewer then in turn brought that information to Bowler who "without any substantial evidence of any wrongdoing by Marchand, and in circumvention of proper procedure" authorized an investigation of Marchand. Id. As a result, Marchand suffered lost wages, benefits, reputation and earning capacity as well as emotional and physical pain, and incurred legal and medical costs. Id. at ¶ 160.

Bowler need not have participated personally in any tortious conduct for liability to attach, so long as he provided "substantial assistance, with the knowledge that such assistance [was] contributing to a common tortious plan." Kurker, 44 Mass.App.Ct. at 189. The conspiracy cause

of action is reserved for application to facts which "manifest a common plan to commit a tortious act where the participants know of the plan and its purpose and take affirmative steps to encourage the achievement of the result." Id. (quoting Stock v. Fife, 13 Mass.App.Ct. 75, 82 n. 10, 430 N.E.2d 845 (1982)).

There is no allegation in the Complaint that Bowler knew of the four Defendant officers' plan to deprive Marchand of his position of Police Prosecutor. The United States Supreme Court, in Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007), has signaled its discomfort with conclusory pleading in conspiracy cases. Twombly, 550 U.S. at 556-557.[4] Marchand's allegations that Bowler acted in concert with Brewer and the Defendant officers are simply conclusory assertions without supporting facts and the Court concludes that under Iqbal and Twombly 's construction of Rule 8, Marchand's pleading of Count XIV has not "nudged [his] claims" . . . across the line from conceivable to plausible." Iqbal, 129 S.Ct. at 1950-1951 (citing Twombly, 550 U.S. at 570). At most, Marchand has pleaded a failure on the part of Bowler to follow proper procedure. There are no non-conclusory allegations suggesting that Bowler was aware of the plan of the four Defendant officers or that he took actions intended to further that plan.

Motion of Defendant Brewer

Claims Advanced Against Brewer

Marchand has advanced eleven claims against Defendant Brewer, the Town Counsel. As noted previously, Count XIII has been voluntarily dismissed. The remaining claims are: for

[4] While Twombly was an antitrust case, its interpretation of the pleading standard is applicable to all civil cases. See Iqbal, 129 S.Ct. at 1941.

violations of Marchand's constitutional rights, pursuant to 42 U.S.C. § 1983 (Counts V, VI, IX and X), for common law conspiracy to violate his civil rights (Count XIV), for violation of the Massachusetts Civil Rights Act, M.G.L. c. 12, §11I (the MCRA)(Count XV); for intentional infliction of intentional infliction of emotional distress (Count XVI); for intentional interference with contractual relations (Count XVIII); and, for intentional interference with advantageous business relations (Count XIX).

Factual Allegations Against Brewer

The factual allegations advanced against Brewer are as follows: that in December, 2006, Defendant Wallace contacted her via anonymous letter making false allegations against Marchand. Docket #1 at ¶ 24. Brewer made no good faith effort to independently verify the allegations and did not refer them to the Police Department's Internal Affairs Officer, who by department regulation is charged with investigating misconduct of police officers. Id. She brought the allegations against Marchand to the attention of Bowler. Id. at ¶ 25. In approximately March, 2007, Brewer and Wallace were working together "in clandestine fashion" to "build a case" against Marchand, with Brewer accepting as true Wallace's false charges. Id. at ¶ 46. In April, 2007, Brewer met with Bowler and the Town Administrator, Candace Wheeler, concerning the allegations against Marchand. Id. at ¶ 47. Brewer brought the false allegations to the entire Board of Selectmen on April 17, 2007. Id. at ¶ 48. The allegations concerned allegedly inappropriate conduct by Marchand at the Newburyport District Courthouse in July, his conduct during arrests in which he had participated in March, 2007, his allegedly inappropriate conduct relating to fundraising activities; and allegations involving Marchand's conduct during an off-duty vacation to Mexico in August, 2006. Id. In May, 2007, Brewer emailed Wallace stating, "I don't think we

have enough to get [Marchand] fired but something will be done." Id. at ¶ 54. Soon thereafter, Wallace emailed Brewer stating, "is … [Marchand] going to the therapy program for anger management? and how do we get the back ground (sic) information on [Marchand] to the therapist." Id. at ¶ 57. Officer Wallace also offered in that email to "put an outline together on behavior issues I have seen and a history on this past year" if Brewer would find that helpful. Id. In August, 2007, Wallace asked Brewer via email whether a letter allegedly sent by Marchand to the Town was "threatening in any way or does it show any emotional instability. If so, his gun permit should be pulled and the Selectmen should speak with Lt. Nyland. We do pull permits for psyl (sic) reasons." Id. at ¶ 77. Town Counsel McKenna replied that she had not seen the letter but instructed Officer Wallace that is she heard "anything more please let me know." Id. An investigation at the direction of the Board of Selectmen included an investigation of Brewer's conduct relative to Marchand. Id. at ¶ 93. That investigation concluded that the information provided to Brewer by Wallace was inaccurate or "not real" and that Brewer accepted Wallace's accusations accepted Wallace's accusations against Marchand "without critical evaluation." Id. at ¶ 95. A second investigation concluded that Defendants Brewer, Dupray, Wallace and Hatfield had engaged in a concerted effort "to have Marchand and/or Chief Cullen prosecuted criminally and to remove them from their employment." Id. at ¶ 104 (quoting the investigative report).

The Federal Constitutional Claims

The constitutional claims are each subject to dismissal. In order to prevail on a Section 1983 claim, a plaintiff must prove: (1) the existence of a federal constitutional or statutory right; and (2) a deprivation of that right as a result of a defendants' actions under color of state law. Watterson v. Page, 987 F.2d 1, 7 (1st Cir.1993).

Count V - Fourteenth Amendment Procedural Due Process - Liberty Interest

Count V is for violation of Marchand's Fourteenth Amendment right to due process of law because Marchand was "improperly investigated" by Brewer and others based on "demonstrably false" allegations, where "a reasonable review of all allegations in the context of due process and a fair procedure would have cleared Marchand before the process even began." Docket #1, at ¶ 123.[5]

The Fourteenth amendment to the United States Constitution restrains the states from depriving any person of life, liberty, or property without due process of law. In Mathews v. Eldridge, 424 U.S. 319 (1976), the United States Supreme Court set forth three factors that normally determine whether an individual has received the "process" that the Constitution finds "due": "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." City of Los Angeles v. David, 538 U.S. 715, 716 (2003)(quoting Mathews v. Eldridge, 424 U.S. at 335). By weighing these concerns, courts can determine whether a State has met the fundamental requirement of due process – that is, "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Id. In this case, Marchand claims an absence of proper process resulted in harm to his reputation resulting from an investigation that should not have proceeded.

[5] Count V appears not to encompass the allegations related to deprivation of Marchand's property interest in his employment, which is the subject of Count VI.

In essence, Marchand asserts a liberty interest in his reputation, or the constitutional right to be free from the stigma associated with false charges. Defamation by a governmental official, standing alone, does not work a deprivation of liberty protected by the Fourteenth Amendment. Rodriguez de Quinonez v. Perez, 596 F.2d 486, 489 (1st Cir.1979)(citing Paul v. Davis, 424 U.S. 693, 708-709 (1976)). The First Circuit employs a "stigma plus" test: "To establish a liberty interest sufficient to implicate fourteenth amendment safeguards, the individual must be not only stigmatized, but also stigmatized in connection with a denial of a right or status previously recognized under state law." Id. (quoting Dennis v. S & S Consolidated Rural High School District, 577 F.2d 338, 341 (5th Cir. 1978)); See also, Koelsch v. Town of Amesbury, 851 F.Supp. 497, 501 (D.Mass.1994)(Saris, J.)(liberty interest not implicated where charges were publicized, but Town Manager was suspended but retained his employment); Lyons v. Sullivan, 602 F.2d 7 11 (1st Cir.1979), cert. denied, 444 U.S. 876, 100 S.Ct. 159, 62 L.Ed.2d 104 (1979)(no deprivation of liberty interest where tenured teacher claimed he had been wrongly branded as needing psychiatric care, and voluntarily resigned from his job); Cronin v. Town of Amesbury, 895 F.Supp. 375, 383-384 (D.Mass.1995)(Saris, J.)(dismissal of plaintiff from a tenured government position based on a charge of perjury implicates liberty interest); Dennis v. S & S Consolidated Rural High School District, 577 F.2d 338 (5th Cir.1978) (liberty interest of non-tenured high school teacher was implicated when members of school board, in explaining why his teaching contract had not been renewed, publicly charged that he had a drinking problem).

Marchand's allegations in Count V do not implicate a protected liberty interest under the First Circuit's "stigma plus" test. Marchand has not alleged the denial of a right or status

protected under state law which was incident to Brewer's actions. Marchand remains in his employment, although on medical leave. Brewer's transmission of information received from Wallace to the Board of Selectmen simply resulted in an investigation into the validity of those charges – one which resulted in no sanction imposed on Marchand and no finding of wrongdoing by Marchand. The "stigma" alone emanating from an unwarranted investigation that resulted in no discipline fails to state a constitutional due process claim, even if the allegations may state a claim for damages under alternative legal theories. The mere violation of town or departmental policies (such as the failure to utilize the internal affairs officer), or even of state law, is not of federal constitutional dimension. See Pendleton v. City of Haverhill. 156 F.3d 57, 63 (1st Cir.1998)(citing Snowden v. Hughes, 321 U.S. 1, 11 (1944); Colon v. Schneider, 899 F.2d 660, 672 (7th Cir.1990)).

Even if Marchand's allegations did implicate a protected liberty interest, the question is sufficiently close that Brewer is protected by a qualified immunity from suit. The principle of qualified immunity shields state actors performing discretionary functions from liability for civil damages when their conduct does not violate clearly-established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Anderson v. Creighton, 483 U.S. 635, 641 (1987). The qualified immunity standard is not a stringent test, and gives ample room for mistaken judgments by protecting all but the plainly incompetent and those who knowingly violate the law. Hunter v. Bryant, 502 U.S. 224, 229 (1991). Government officers are shielded from civil liability "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated."

Anderson v. Creighton, 483 U.S. 635, 638 (1987).[6]

In evaluating claims of qualified immunity, the First Circuit employs a three-part framework. Carter v. Lindgren, 502 F.3d 26, 30 (1st Cir.2007). The first inquiry is "whether the plaintiff has alleged the violation of a constitutional right." Id. If yes, the second is "whether the right was clearly established" at the time of the violation. Id. Finally, if violation of a clearly established constitutional right has been alleged, the Court examines the facts of the case and asks whether an objectively reasonable government official would have believed that the action taken violated that right. Id.

Here, the Court has already concluded, supra, that Count V does not allege violation of a constitutional right. But even if it had done so, the Court further concludes that a reasonable Town Counsel presented with allegations concerning the mental state and fitness for duty of a town police officer – advanced by another police officer -- would not have believed that passing that information on to her client (the Board of Selectmen) violated the constitutional rights of the officer complained against.

Accordingly, Count V is DISMISSED as to Defendant Brewer.

Count VI - Fourteenth Amendment Procedural Due Process - Property Interest

In Count VI, Marchand alleges the deprivation of his property interest in his continued employment because the actions of the Defendants (including Brewer) have rendered Marchand psychologically impaired such that he cannot perform the duties of a police officer or seek

[6] At the hearing on the motions, Marchand's counsel suggested that Brewer was not acting in her capacity as Town Counsel and thus not performing discretionary functions for purposes of qualified immunity analysis. The Court finds nothing in the allegations of the Complaint to suggest that any of Brewer actions were undertaken in any capacity other than her role as Town Counsel.

comparable employment. Docket #1 at ¶ 132. Marchand contends that, as a result, Brewer violated his substantive due process rights. Docket #28 at 14. A town counsel's actions in passing on to her client, the Board of Selectmen, allegations that a police officer was acting improperly, or in conducting an unauthorized and flawed investigation without probing the truthfulness of the allegations at the outset, or, even joining a conspiracy with others to bring about an officer's termination, may well violate state law and/or fell below the level of competent conduct expected of an attorney – but, on the allegations of the complaint, they fail to satisfy the very high standard the Supreme Court has established for a substantive due process claim. See Mongeau v. City of Marlborough, 492 F.3d 14, 19 (1st Cir. 2007)(plaintiff pursuing a substantive due process claim must show state action which is egregiously unacceptable, outrageous, or conscience-shocking). These allegations simply fail to "shock the conscience." Moreover, Brewer would be entitled to qualified immunity from suit, for the reasons stated, supra. Accordingly, Count VI is DISMISSED as to Defendant Brewer.

Count IX - Fourteenth Amendment - Defamation

Count IX alleges that Brewer and other defendants defamed Marchand and irreparably damaged him by their "meritless investigation based on fabricated facts." Docket # 1 at ¶ 42. Marchand also alleges that the "investigation of Marchand was rendered in bad faith and with malice." Id. at ¶ 43. The Count is therefore a subset of or analogous to the allegations made in Count V. As discussed supra at 10-11, defamation by a governmental official, standing alone, does not work a deprivation of liberty protected by the Fourteenth Amendment. Rodriguez de Quinonez v. Perez, 596 F.2d 486, 489 (1st Cir.1979)(citing Paul v. Davis, 424 U.S. 693, 708-709 (1976)). Thus, Count IX is DISMISSED for the same reasons as Count V.

Count X - Fourteenth Amendment - Privacy

Count X arises from the allegation that Brewer disseminated Marchand's confidential medical information to Defendant Wallace, in violation of his Fourteenth Amendment due process guarantee of personal privacy. Despite Brewer's objection, the totality of the allegations of the complaint are sufficient to support the inference, drawing all inferences in Plaintiff's favor, that Brewer disclosed to other officers the psychiatric medication Marchand was receiving.

Magistrate Judge Bowler determined that "it is well established that plaintiff has a constitutional right to privacy sufficient to establish liability under section 1983." Doe v. Town of Plymouth, 825 F.Supp. 1102, 1108 (D.Mass. 1993)(citing Daury v. Smith, 842 F.2d 9, 13 (1st Cir. 1988)("That a person has a constitutional right to privacy is now well established.")). In Borucki v. Ryan, 827 F.2d 836 (1st Cir.1987), a decision slightly predating Daury, the First Circuit emphasized that, in the qualified immunity context, "it is not sufficient for a court to ascertain in a general sense that the alleged right existed," but rather a court must determine whether an alleged right was established with sufficient particularity that a reasonable official could anticipate that his actions would violate that right. Borucki, 827 F.3d at 838. "For example, although it is clear that there is a right to freedom of speech, it may not be clear that censoring a prisoner's mail will violate that right; and, although it is clear that there is a right to freedom of religion, it may not be clear that shaving off a prisoner's beard grown for religious reasons will violate that right." Id.

On the pending motion, the question is whether disclosing Marchand's medication or the fact of his receiving psychiatric treatment (implicit in the medication disclosure) was clearly established as a violation of his constitutional right to privacy. The First Circuit left this question

open in Borucki stating that the law was not "clearly established" that a constitutional privacy right would be violated by a disclosure of information (as distinct from an area of life protected by the autonomy branch of the right to privacy). Id. at 848. Since Borucki, the law (both within and outside of this circuit) has developed further; this issue was carefully canvassed and analyzed in Doe v. Magnusson, 2005 WL 758454 (D.Me. 2005). The more recent developments discussed therein persuade me that Marchand has a constitutional right to privacy in the non-disclosure of confidential mental health information allegedly disclosed for no legitimate public purpose.[7] However, that right was not, at the relevant time, clearly established. Neither the Supreme Court nor the First Circuit case has recognized clearly the right. The law in other circuits is divided. See Doe v. Magnusson, 2005 WL 758454 (D.Me. 2005). Both the Second Circuit in Powell v. Shriver, 175 F.3d 107, 113-14 (2nd Cir.1999) and the Third Circuit in Doe v. Delie, 257 F.3d 309, 319 (3rd Cir.2001) have concluded that the right to privacy protecting non-disclosure of medical information was not clearly established. Accordingly, the constitutional right to privacy under the Fourteenth Amendment was not clearly established at any time relevant to the Complaint, and Brewer is entitled to qualified immunity from suit. Count X is DISMISSED as to Defendant Brewer.

State Law Statutory Claims

Count XV - Massachusetts Civil Rights Act

The MCRA was not enacted in order to create a "vast constitutional tort," but rather its remedies are explicitly limited. Haufler v. Zotos, 446 Mass. 489, 506 (2006). To establish a

[7] Neither party has brought to the Court's attention or relied upon decisions more recent than Doe.

claim under the MCRA, Marchand must prove that (1) his exercise or enjoyment of rights secured by the Constitution or laws of either the United States or of the Commonwealth, (2) has been interfered with, or attempted to be interfered with, and (3) that the interference or attempted interference was by "threats, intimidation or coercion." Id. In the context of the act, a "threat" consists of "the intentional exertion of pressure to make another fearful or apprehensive of injury or harm." Id. (citing Planned Parenthood League of Mass., Inc. v. Blake, 417 Mass. 467, 474-475 (1994). "Intimidation" involves "putting in fear for the purpose of compelling or deterring conduct." Id. "Coercion" is "the application to another of such force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done. The Complaint contains no specific allegation of "threats, intimidation or coercion" and nothing alleged by Marchand in the Complaint rises to the level of threats, intimidation or coercion by Brewer. The effort to get Marchand fired which is alleged in the Complaint does not rise to the level of threats, intimidation or coercion within the meaning of the statute. Accordingly, Brewer's motion is ALLOWED with respect to Count XV.

Count XI - Violation of M.G.L. c. 214, § 1B

Count XI raised the same claim as Count X (for dissemination of confidential medical information), but rather than asserting a federal constitutional violation, it is brought pursuant to M.G.L. c. 214, § 1B, which provides that "A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages." The Supreme Judicial Court has made it clear that a plaintiff must show that the interference was unreasonable and either substantial or serious. Schlesinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 409

Mass. 514, 517-519 (1991); O'Connor v. Police Commissioner of Boston, 408 Mass. 324, 330 (1990). The disclosure of private facts about an employee among other employees in the same workplace can constitute sufficient publication under M.G.L. c. 214, § 1B. Bratt v. International Business Machines Corp., 392 Mass. 508, 518-519 (1984).

While Brewer suggests that there is no allegation that she had anything to do with the alleged dissemination of information about Marchand's medication, the Complaint does alleges that, "[t]he Town of Hamilton, by and through Town Counsel [Brewer] acting under color of state law, provided Officer Wallace with confidential medical information pertaining to Marchand in violation of his right to privacy." Docket # 1, at ¶ 146. No construction of that paragraph is possible other than that it was Brewer herself who personally disseminated the information.

Accordingly, the Complaint states a claim for violation of privacy under Massachusetts law against Brewer, and her motion is DENIED with respect to Count XI.

Count XIV, Common Law Conspiracy.

Similarly, the allegations against Brewer are sufficient to state a claim for common law conspiracy. As noted supra with regard to Defendant Bowler's motion, Brewer need not have participated personally in any tortious conduct for liability to attach, so long as she provided "substantial assistance, with the knowledge that such assistance [was] contributing to a common tortious plan." Kurker, 44 Mass.App.Ct. at 189. The conspiracy cause of action is reserved for application to facts which "manifest a common plan to commit a tortious act where the participants know of the plan and its purpose and take affirmative steps to encourage the achievement of the result." Id. (quoting Stock v. Fife, 13 Mass.App.Ct. 75, 82 n. 10, 430 N.E.2d

845 (1982)). Defendant Brewer is in a different position than Defendant Bowler because Marchand has pleaded facts plausibly suggesting her awareness of the officers' alleged plan and acts taken by her to encourage that result. For example, the emails between Brewer and Wallace are at least susceptible to the interpretation that Brewer (as suggested by her use of the word "we" in her email to Wallace stating, "I don't think we have enough to get [Marchand] fired but something will be done") was aware of Wallace's intentions. See Docket # 1 at ¶¶ 54, 77. Their discussion of the possibility of causing Marchand's license to carry to be revoked (a scenario which later came to fruition), of ways Wallace might accumulate evidence against Marchand and Brewer's admonition to Wallace to keep her informed are also at least susceptible to the same interpretation. Id. Finally, Marchand has pleaded that an independent investigator concluded that Brewer was among those who had engaged in a concerted effort to have Marchand and/or Chief Cullen prosecuted criminally and to remove them from their employment. " Id. at ¶ 104 (quoting the investigative report). While not necessarily indicative of wrongdoing, these specific factual allegations have nudged Marchand's claim across the line from merely conceivable to plausible under Iqbal and Twombly 's construction of Rule 8. See Iqbal, 129 S.Ct. at 1950-1951 (citing Twombly, 550 U.S. at 570). Accordingly, Marchand's motion is DENIED with regard to Count XIV.

Count XVI - Intentional Infliction of Emotional Distress

Count XVI is for intentional infliction of emotional distress. The elements of the tort are that "(1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of [the] conduct; (2) that the conduct was 'extreme and outrageous,' was 'beyond all possible bounds of decency' and was 'utterly

intolerable in a civilized community;' (3) that the actions of the defendant were the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was 'severe' and of a nature 'that no reasonable man could be expected to endure it.' " Agis v. Howard Johnson Company, 371 Mass. 140, 144, 355 N.E.2d 315 (1976). The allegations against Brewer, if true, suffice to state such a claim. See, e.g., Armano v. Federal Reserve Bank of Boston, 468 F.Supp. 674 (D.Mass.1979)(disapproved on other grounds by Caputo v. Boston Edison Co., 924 F.2d 11 (1st Cir. 1991)(A factual question for the jury was raised by as to whether allegations that the defendant tried to harass the plaintiff into quitting his job by, among other things, spreading rumors that he was caught or suspected of stealing money was extreme and outrageous enough to permit recovery), Cf. Conway v. Smerling, 37 Mass.App.Ct. 1, 8-9 (1994), (investigation and reporting of a suspected embezzlement was not outrageous where founded on a reasonable apprehension based upon objective facts). Brewer's motion is DENIED with respect to Count XVI.

Count XVIII - Intentional Interference with Contractual Relationship

Count XVIII is for Brewer's Intentional Interference with Contractual Relationship, alleging that Marchand had a contractual relationship in the form of the Collective Bargaining Agreement between the Town and the Hamilton Police Benevolent Association, and that Brewer and others "knowingly attempted to break the contract" (emphasis added). Docket #1 at ¶ 179. The tort requires that the plaintiff prove that "(1) he had a contract with a third party; (2) the defendant knowingly induced the third party to break that contract; (3) the defendant's interference, in addition to being intentional, was improper in motive or means; and (4) the plaintiff was harmed by the defendant's actions." Melo-Tone Vending, Inc., 39 Mass.App.Ct. 315,

318 (1996)(quoting G.S. Enterprises, Inc. v. Falmouth Marine, Inc., 410 Mass. 262, 277 (1991). Marchand has not alleged, and there are no facts alleged in the Complaint supporting the conclusion, that the Collective Bargaining Agreement was breached. Brewer's motion is ALLOWED with respect to Count XVIII.

Count XIX - Intentional Interference With Contractual Relationship

Finally, Count XIX is for Intentional Interference With Contractual Relationship and alleges the same facts as the previous count. The elements of the claims are substantially similar. Cavicchi v. Koski, 67 Mass.App.Ct. 654, 657 (2006). This count requires that Marchand prove that (1) he had a business relationship for economic benefit with a third party, (2) Brewer knew of the relationship, (3) Brewer interfered with the relationship through improper motive or means, and (4) his loss of advantage resulted directly from the defendants' conduct." Id. (citing Kurker v. Hill, 44 Mass.App.Ct. 184, 191, 689 N.E.2d 833 (1998)). Thus, while Count XVIII requires proof of a breach (an allegation which the Court found lacking), the instant count requires only an allegation of interference. However, there are no facts pleaded in the Complaint from which one could reasonably conclude that Marchand suffered the loss of a right under the CBA resulting directly from Brewer's alleged conduct. Brewer is alleged to have passed information from Wallace to the Board of Selectman, with the result that an investigation ensued which resulted in Marchand's exoneration. Marchand makes no reference in the Complaint to any provisions of the CBA. He remains employed by the Town, on "injured on duty" status. While the Court is mindful of the fact that Marchand alleges that Brewer's conduct caused him emotional distress which rendered him unable to perform his duties, that alleged conduct does not amount to an interference with the CBA which caused Marchand losses relating to the CBA. Marchand's

pleading of this count is merely the threadbare recital of the elements of a cause of action. Brewer's motion is ALLOWED with respect to Count XIX.

Finally, the Court has received the Plaintiff's supplemental opposition (Docket #59). Although the Plaintiff failed to seek leave to make this filing as is required by L.R. 7.1(B)(3), the Court has nonetheless considered it (although in the future, the Court expects counsel to seek leave in advance for the filing of additional memoranda). However, the Court has not considered the attached factual material. The pending motions are Rule 12 motions to dismiss (not motions for summary judgment) and thus the Complaint stands or falls without reference to factual matter produced in discovery.

CONCLUSION

Count XIII of the Complaint is voluntarily DISMISSED as to all defendants.

Defendant Bowler's motion (Docket # 29) is ALLOWED.

Defendant Brewer's Motion (Docket #20) is ALLOWED IN PART and DENIED IN PART. The motion is DENIED with respect to Count XI, for invasion of privacy under state law, Count XIV, for common law conspiracy, and Count XVI for Intentional Infliction of Emotional Distress. The motion is ALLOWED in all other respects.

SO ORDERED.

/s/ Leo T. Sorokin

Leo T. Sorokin
United States Magistrate Judge